COA NO. 42425-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL KERBY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. THE COURT VIOLATED KERBY'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE.

a. The Private Sidebar Constitutes A Closure For Public Trial Purposes.

In the opening brief, Kerby argued the court violated his right to a public trial when it conducted a portion of the jury selection process at an off-the-record sidebar discussion. Brief of Appellant (BOA) at 12-19. In response, the State claims no closure occurred, attempting to distinguish sidebar conferences from closures in which the public is prevented from entering the courtroom for a portion of jury selection. Brief of Respondent (BOR) at 2-3.

This Court has already rejected the State's proposed distinction. State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) ("if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview"), review granted, 176 Wn2d 1031, 299 P.3d 20 (2013).

One type of "closure" is "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011).

Physical closure of the courtroom, however, is not the only situation that violates the public trial right. Another type of closure occurs where a proceeding takes place in a location inaccessible to the public, such as a judge's chambers or hallway. Lormor, 172 Wn.2d at 93 (chambers); State v. Leyerle, 158 Wn. App. 474, 477, 483, 484 n.9, 242 P.3d 921 (2010) (moving questioning of juror to hallway outside courtroom was a closure).

Thus, whether a closure — and hence a violation of the right to public trial — has occurred does not turn only on whether the courtroom has been physically closed. Members of the public are no more able to approach the bench and listen to an intentionally private jury selection process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical impact is the same — the public is denied the opportunity to scrutinize events.

In claiming otherwise, the State remarks "[n]o portion of the process was conducted outside *the view* of individuals in the courtroom." BOR at 2 (emphasis added). What good is a view of individuals when the public cannot hear what is going on? A silent view is worthless. When jury selection occurs at a private sidebar conference, the public is unable to observe what is taking place in any meaningful manner because the public cannot hear what is going on. As a practical matter, the judge

might as well have conducted the peremptory challenge process in chambers or dismissed the public from the courtroom altogether because the public was not privy to what occurred. See Slert, 169 Wn. App. at 774 n.1.

The State asserts the peremptory challenges took place by passing a list between the two attorneys during the sidebar. BOR at 1. The record does not show peremptory challenges were exercised by passing a list. 3RP 24-27; 4RP 106; CP 96-100. But assuming the record showed otherwise, the public did not have contemporaneous access to that list. The State implicitly recognizes this state of affairs in arguing the public should not be made privy to anything that occurs at sidebar. BOR at 3. What took place in secret and in private should have taken place in open court in a manner that allows the public to observe the peremptory challenge process as it was taking place. See State v. Paumier, 176 Wn.2d 29, 32-33, 288 P.3d 1126 (2012) (public trial violation where public not privy to in-chambers questioning of prospective jurors, even though process "was recorded and transcribed by the court").

b. The Right To Public Trial Attaches To The Peremptory Challenge Process Because It Is An Integral Part Of Jury Selection.

The State claims the peremptory challenge process is not subject to the right to public trial. BOR at 2. The State is wrong.

This Court recognizes the right to a public trial attaches to the portion of jury selection involving peremptory challenges. State v. Wilson, __ Wn. App. ___, 298 P.3d 148, 155-56 (2013); State v. Jones, __Wn. App.__, __P.3d __, 2013 WL 2407119 at *5-6 (slip op. filed June 4, 2013); see also People v. Harris, 10 Cal. App. 4th 672, 681-682, 684, 12 Cal. Rptr. 2d 758 (1992) ("The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends"; peremptory challenges made in chambers on paper violated public trial right even where proceedings were reported and results announced publicly), review denied, (Feb. 02, 1993).

In Wilson, this Court held the public trial right was not implicated when the bailiff excused the two jurors solely for illness-related reasons before voir dire began. Wilson, 298 P.3d at 158. In reaching that holding, the Court distinguished the administrative removal of jurors before the voir dire process began to later portions of the jury selection process that implicated the public trial right, including the peremptory challenge process. Id. at 155-56.

This Court recognized "both the Legislature and our Supreme Court have acknowledged that a trial court has discretion to excuse jurors outside the public courtroom for statutorily-defined reasons, *provided such*

juror excusals do not amount to for-cause excusals or *peremptory challenges traditionally exercised during voir dire in the courtroom.*" Id. at 156 (emphasis added). A trial court is allowed "to delegate hardship and other administrative juror excusals to clerks and other court agents, *provided that the excusals are not the equivalent of peremptory or for cause juror challenges.*" Id. (emphasis added). Wilson's public trial argument failed because he could not show "the public trial right attaches to any component of jury selection that does not involve 'voir dire' or a similar jury selection proceeding involving the exercise of 'peremptory' challenges and 'for cause' juror excusals." Id. at 155.

In Jones, this Court held the court violated the right to public trial when, during a court recess off the record, the trial court clerk drew four juror names to determine which jurors would serve as alternates. Jones, 2013 WL 2407119 at *1. It recognized "both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." Id. at *7. The Court likened the selection of alternate jurors to the phases of jury selection involving for-cause and peremptory challenges. Id. at *5 ("Washington's first enactment regarding alternate jurors not only specified a particular procedure for the alternate juror selection, but it specifically instructed that alternate jurors be called in the

same manner as deliberating jurors and subject to for-cause and peremptory challenges in open court.").

In Jones, there was a public trial violation because alternate juror selection was akin to the jury selection process involving regular jurors, including the peremptory challenge process. In Wilson, there was no public trial violation because the administrative removal of jurors for hardship was not akin to other portions of the jury selection process, including the peremptory challenge process. Both cases support Kerby's argument that the public trial right attaches to the peremptory challenge process because it is an integral part of the jury selection process.

The selection process was closed to the public because which party exercised which peremptory challenge and the order in which the peremptory challenges were made were not subject to public scrutiny. Harris, 10 Cal. App. 4th at 683 n.6. The sequence of events through which the eventual constituency of the jury "unfolded" was kept private. Id.

The public does not need access to private conversations between an attorney and his client, or between a prosecutor and his lead investigator, regarding which jurors to peremptorily strike. But the public is entitled to know "(a) Which party exercised which peremptory challenge; (b) The order in which the peremptory challenges were made;

and (c) The order in which supplemental prospective jurors were 'moved forward' to take the place of the prospective jurors who had been peremptorily challenged." Id.

It is particularly important that the peremptory challenge process be open to the public to serve as a check upon the removal of potential jurors on the impermissible basis of race or gender. A prosecutor's use of a peremptory challenge based on race or gender violates a defendant's right to equal protection. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (race); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992) (gender).

Discrimination in the selection of jurors places the integrity of the judicial process and fairness of a criminal proceeding in doubt. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). Improper removal of potential jurors occurs through the exercise of peremptory challenges. See, e.g., State v. Cook, __Wn. App.__, __P.3d__, 2013 WL 2325117 at *1 (slip op. filed May 28, 2013); State v. Rhone, 168 Wn.2d 645, 648-51, 229 P.3d 752 (2010).

While members of the public could discern, after the fact, which prospective jurors had been removed, the public could not tell which party had removed any particular juror, making it impossible to determine

whether a particular side had improperly targeted any protected group based, for example, on gender or race.

The public trial right encompasses circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); Leyerle, 158 Wn. App. at 479. Having the peremptory process of jury selection open to the public acts as a safeguard against discriminatory removal of jurors. Public scrutiny discourages discriminatory removal from taking place and holds the court accountable by requiring careful scrutiny of whether the removal of a potential juror is justified by a non-discriminatory reason.

The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. State v. Wise, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012). "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings.'" Wise, 176 Wn.2d at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31

(1984)). The peremptory challenge process squarely implicates those values. The process of selecting jurors through the exercise of peremptory challenges was not open to the public. Reversal is required because the court did not justify the closure under the Bone-Club standard. Wise, 176 Wn.2d at 12-14; State v. Bone-Club, 128 Wn.2d 254, 258-60, 906 P.2d 325 (1995).

2. THE COURT VIOLATED KERBY'S RIGHT TO SELF-REPRESENTATION.

Kerby argued in the opening brief that the court violated his constitutional right to self-representation. BOA 19-31. The State claims the court did not abuse its discretion because the June 13 letter regarding Kerby's desire to proceed pro se was "equivocal" and Kerby did not reassert his desire to proceed pro se at the June 17 hearing. BOR at 5, 8.

Kerby stands by the argument made in the opening brief. The additional transcripts ordered by the State do not change the conclusion that the court violated Kerby's right to self-representation. Kerby wanted to proceed pro se at his preliminary appearance but withdrew that request as of the March 21, 2011 hearing. RP (3/1/11) at 2; RP (3/21/11) at 6-7. Kerby later reasserted his request to proceed pro se in his June 13 letter and the judge wrote back, assuring Kerby that his request would be

addressed at the upcoming hearing. CP 86, 91, 95. Kerby's request to proceed pro se in the June 13 letter was unequivocal. See BOA at 22-24.

The court nonetheless disregarded Kerby's pro se request at that hearing. 3RP 7-14. The court simply denied Kerby's request for new counsel and ignored Kerby's alternative request that he be allowed to proceed pro se, despite the fact that the hearing was scheduled to specifically address both issues. 3RP 13-14. Having been told by the judge that his request to proceed pro se would be addressed at that hearing, it was not incumbent upon Kerby to make yet another request in order to have it deemed unequivocal.

Contrary to the State's suggestion, Kerby's case is materially different from State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Stenson filed a written request for new counsel before trial without any mention of wanting to proceed pro se if the request was denied. Stenson, 132 Wn.2d at 733. After the trial court denied the Stenson's motion for new counsel at a hearing on the matter, Stenson raised his desire to proceed pro se for the first time. Id. at 739-40. The trial judge engaged in a colloquy on the matter with Stenson, telling him to his face that it was finding "*based upon your indications that you really do not want to proceed without counsel.*" Id. at 740. Stenson did not deny the court's direct finding on that matter. Id. at 740,

742. Stenson subsequently filed a written petition several days later requesting the court to appoint new lead counsel and retain the existing second counsel, again without any mention of wishing to represent himself. Id. at 740. Under these circumstances, the request to proceed pro se was deemed equivocal. Id. at 741-42.

In contrast to Stenson, Kerby filed a written request to proceed pro se as an alternative to new counsel before a hearing scheduled on both matters was to take place. The fact that Kerby couched his request to proceed pro se as the alternative in the event he was denied new counsel does not render the request equivocal. State v. Madsen, 168 Wn.2d 496, 507, 229 P.3d 714 (2010). In Stenson, the trial judge actually discussed the pro se request at the hearing. Stenson, 132 Wn.2d at 740. The judge in Kerby's case did not do that. In Stenson, the defendant did not refute the trial judge's point blank finding that there was no real desire to proceed pro se. Id. at 740, 742. In Kerby's case, the judge failed to address Kerby's pro se request altogether, even though the hearing was scheduled to not only address Kerby's motion for new counsel but also his alternative motion to proceed pro se. Kerby made an unequivocal request to proceed pro se and the trial judge erred in denying that request.

3. THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO CAUTION THE JURY ABOUT UNRELIABLE ACCOMPLICE TESTIMONY.

In the opening brief, Kerby argued he was entitled to an instruction cautioning the jury about the accomplice testimony of Chrisman and that reversal is required because Chrisman's testimony was not substantially corroborated. BOA at 31-38.

The State claims no cautionary instruction was needed because Chrisman was not an accomplice. BOR at 9-12. When determining if the evidence supports the instruction, however, the reviewing court must consider the evidence in the light most favorable to Kerby. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005). The record shows Chrisman yelled, "shoot his ass" right before Strickland shot Ivey and Savage. 3RP 97, 134, 136, 168-69. That makes her an accomplice because she could have been charged with the same crime. State v. Boast, 87 Wn.2d 447, 455, 553 P.2d 1322 (1976); RCW 9A.08.020(3)(a)(i) (person is liable as an accomplice for the criminal conduct of another if, with knowledge that it will facilitate commission of a crime, she "[s]olicits, commands, encourages, or requests such other person to commit it.").

The State alternatively contends the failure to give the cautionary instruction did not amount to reversible error on the ground that

Chrisman's testimony was substantially corroborated. BOR at 12-14. Kerby stands by the argument made in his opening brief. No one but Chrisman maintained Kerby pulled a gun in the midst of the confrontation with Ivey and Savage. 3RP 366-67, 437. Chrisman was the only witness who testified that Kerby said "I'm going to shoot the motherfucker" right before Ivey and Savage were shot. 3RP 366, 436-37. The State's theory was that Kerby was guilty as an accomplice because he gave the gun to Strickland. 5RP 133-34, 148, 222-23, 229-30. Chrisman's uncorroborated testimony supported the State's theory on this key point. The court committed reversible error in failing to give the cautionary instruction.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Kerby requests that this Court reverse the convictions and remand for a new trial.

DATED this 17th day of July 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, DSHS, Respondent, v. MICHAEL KERBY, Appellant.	)	COA NO. 42425-8-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 1ST DAY OF JULY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL KERBY
DOC NO. 725509
WASHINGTON STATE PENITENIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF JULY, 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

July 01, 2013 - 2:39 PM

Transmittal Letter

Document Uploaded: 424258-Reply Brief.pdf

Case Name: Michael Kerby
Court of Appeals Case Number: 42425-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: **mayovskyp@nwattorney.net**

A copy of this document has been emailed to the following addresses:

gfuller@co.grays-harbor.wa.us
backlundmistry@gmail.com